



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program

Rulemaking 04-04-026
(Filed April 22, 2004)

**INDEPENDENT ENERGY PRODUCERS ASSOCIATION'S
COMMENTS ON DRAFT OPINION ON AMENDED PETITION FOR MODIFICATION
OF DECISION 04-06-014 REGARDING STANDARD TERMS AND CONDITIONS**

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October 22, 2007

Attorneys for Independent Energy Producers
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Program

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The Independent Energy Producers Association (IEP) respectfully submits these Opening Comments, pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. The Proposed Decision includes a proposed, non-modifiable standard contract term that creates unacceptable project risk to developers for changes in law outside the developer's control. The effect of the proposed, non-modifiable standard term, unless amended as proposed below, will certainly be to increase the cost of renewable projects and probably to disable development in some instances. IEP is authorized to state to the Commission that its concerns over the proposed decision are shared by the entities listed in Attachment A hereto and that they approve of the comments and recommendation made below.

The Proposed Decision proposes a non-modifiable standard contract term and condition ("STC 6") to be included in each renewable contract:

Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement: (i) the Project qualifies, is certified by the CEC, and, in the event of changes in law continues to be certified by the CEC, as an Eligible Renewable Energy Resource; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard.

Proposed Decision, Attachment A at 2.

The California Renewable Portfolio Standard (RPS) is a function of legislative action. In this context, it is critical to remember the axiom: that which the legislature creates, it may take-away. The possibilities for legislative or regulatory change in law that could upend a renewable project are almost without limitation and certainly are within the legislature's historical capabilities. For example, it is not inconceivable that a future legislature could modify the eligibility requirements in the following ways:

- Redefine technologies that are eligible for RPS consideration;
- Decrease the maximize size of eligible hydroelectric projects below the current 30 MW limit;
- Impose size limitations for eligible projects in general;
- Eliminate and/or modify eligibility of out-of-state renewable resources;
- Eliminate eligible fuel types, such as biomass fuel developed in accordance with the Z'berg-Nejedly Forest Practice Act of 1973;
- Remove eligibility for run-of-the-river hydro;
- Modify standards associated with the initial commercial operations date of the facility; and
- Link eligibility to avian protection measures for wind projects.

There undoubtedly are many more potential shifts in law or regulation that are also plausible of adoption. In every case, the imposition of a standardized, *NON-MODIFIABLE* contractual term/requirement to maintain eligibility, imposed for the duration of the contract on the developer/generator (many contracts run 20 years), is unreasonable and unnecessary. As proposed it is also patently unfair and discriminatory to independent renewable projects in comparison with utility-owned renewable projects. If the proposed term is maintained it must be

made equally applicable to utility-owned projects that then will pass along inherently higher development costs to customers. Moreover, the adverse significance of the proposed standard term goes beyond the RPS contracting process – this proposed assignment of change in law risk is a sea change in the regulatory compact that will likely permeate and chill development and investment in California generally, and certainly increase customer costs whether or not a utility is involved.

The imposition of such a mandatory, non-modifiable contractual requirement will result in the loss of undeveloped renewable projects and risks the potential shut down of generation facilities if they can be built at all in the face of such risk. It may not be physically possible to maintain the eligibility of a particular unit in event there are changes to the eligibility requirements along the lines of the possible changes referenced above and, even if it were physically possible, the costs of doing so could be prohibitive. It is also not clear that there would be any way, short of making physical changes to the project, for the developer to mitigate or insure against the change in law risk – for example, if, as we would expect, most if not all of the RPS-eligible capacity is under contract already, there may not be a market for “backup” renewable power that could satisfy the requirements of the contract. Any mitigation measures that may be feasible would of course be expected to significantly increase prices and customer cost. Even if some developers were themselves willing to bear the change of law risk, we do not believe that traditional non-recourse project financing will be made available to the projects on economic terms.

All of these outcomes are completely antithetical to encouraging and facilitating renewable project development at the lowest customer cost.

IEP recognizes that eligibility as a renewable resource is the central point of the contracts at issue. A project certainly should and reasonably can provide that certification based on known criteria. A project, however, certainly cannot provide assurance that it would be certified in the future based on other, unknown criteria.

Accordingly, IEP respectfully suggests that STC 6 be modified as follows:

Seller, and, if applicable, its successors, represents and warrants that (a) as of the Effective Date, the Project is certified by the CEC as an Eligible Renewable Energy Resource and (b) throughout the Delivery Term of this Agreement: (i) the Project qualifies, ~~is certified by the CEC, and, in the event of changes in law continues to be certified by the CEC,~~ as an Eligible Renewable Energy Resource as defined at the Effective Date of this Agreement; and (ii) the Project's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard as of the Effective Date of this Agreement.

Dated: October 22, 2007

Respectfully submitted,



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Attachment A

Caithness Operating Company
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Calpine Corporation
Colmac Energy
Competitive Power Ventures, Inc. (CPV)
Constellation Energy Commodities Group, Inc.
Constellation NewEnergy, Inc.
Covanta Power Pacific, Inc.
Dynergy, Inc.
Enpower Management Corp.
enXco Service Corp.
FPL Energy, L.L.C.
GWF Power Systems, L.P.
Invenergy LLC
LS Power Associates, L.P.
MidAmerican/CalEnergy
Millennium Energy, L.L.C.
Minnesota Methane
NRG Energy
PPM Energy, Inc.
Semptra Generation
Sierra Pacific Industries
Wellhead Electric Company
Wheelabrator Technologies, Inc.

Certificate of Service

I hereby certify that I have this day served a copy of “Independent Energy Producers Association’s Comments On Draft Opinion On Amended Petition For Modification Of Decision 04-06-014 Regarding Standard Terms And Conditions” on all known parties to R.04-04-026 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on October 22, 2007 at Sacramento, California

_____/s/____

Eric Janssen

R.04-04-026
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